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No. .....

In The

Supreme Court of the United States

OCTOBER TERM, 1983

JAMES COCKRELL,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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QUESTIONS PRESENTED

DOES A FINDING THAT APPOINTED COUNSEL WAS DILIGENT SATISFY THE STANDARD OF PROFESSIONAL COMPETENCE ESTABLISHED BY *McMANN V. RICHARDSON*?

WHERE A DEFENDANT CLAIMS INEFFECTIVE ASSISTANCE FOR FAILURE TO INVESTIGATE AND FOR FAILURE TO PRESENT FACT AND CHARACTER WITNESSES, MUST THE UNCALLED WITNESS CLAIM BE EXAMINED IN THE LIGHT OF COUNSEL'S DUTY TO INVESTIGATE PLAUSIBLE DEFENSES AVAILABLE TO THE ACCUSED?

DOES THE FAILURE OF APPOINTED COUNSEL TO PRESENT SUBSTANTIVE EVIDENCE OF INNOCENCE THROUGH AVAILABLE CHARACTER WITNESSES DEPRIVE THE ACCUSED OF EFFECTIVE ASSISTANCE OF COUNSEL?

TO ESTABLISH PREJUDICE FOR FAILURE OF COUNSEL TO PRESENT AVAILABLE FACT AND CHARACTER WITNESSES, IS THE DEFENDANT REQUIRED TO SHOW THAT THE OUTCOME OF HIS TRIAL WOULD HAVE BEEN ALTERED BY THE UNPRESENTED TESTIMONY?

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TO THE HONORABLE JUSTICES OF THE SUPREME COURT:

The Petitioner, James COCKRELL [hereinafter "COCKRELL"] respectfully prays that a Writ of Certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit entered in this proceeding on December 16, 1983, rehearing and suggestion of en banc hearing denied January 19, 1984. COCKRELL has noted that the Court heard argument on January 10, 1984, in two cases alleging ineffective assistance of counsel, *Washington v. Strickland*, 693 F.2d 1243 (5th Cir. 1982), *cert. granted*, — U.S. —, 103 S.Ct. 2451, 77 L.Ed. 2d 1332 (1983)

and *United States v. Cronic*, 675 F.2d 1126 (10th Cir. 1982), *cert. granted*, — U.S. —, 103 S.Ct. 1182, 75 L.Ed. 2d 430 (1982). COCKRELL respectfully asks that action on his petition be deferred until the court has decided the cited cases or that decision in the pending cases be deferred until the Court has considered briefs and arguments on COCKRELL'S Petition.

OPINION BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit, reported at 720 F.2d 1423 (5th Cir. 1983), *reh. denied*, — F.2d — (1984), is attached as Appendix A. The court's order denying rehearing and en banc consideration is attached as Appendix B. The Findings, Conclusions and Recommendation of the United States Magistrate, rejected by the District Court, and the Order of the District Court appear as Appendices C and D.

JURISDICTION

The jurisdiction of this court is invoked under 28 U.S.C., Section 1254(1). This petition was filed within 60 days of January 19, 1984, the date the Fifth Circuit denied petition for rehearing and suggestion of en banc hearing.

CONSTITUTIONAL PROVISIONS INVOLVED

Constitution of the United States, Amendment VI, in pertinent part:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed . . . and to have the assistance of counsel for his defense.

STATEMENT OF THE CASE

A. COURSE OF PROCEEDINGS AND DISPOSITION BELOW

COCKRELL was one of five Defendants tried for conspiracy to defraud and fifteen substantive offenses in furtherance of the conspiracy, consisting of mail fraud, wire fraud, and interstate transportation of checks taken by fraud, in violation of 18 U.S.C. 1341, 1343 and 2314. The alleged conspiracy involved the sale of worthless silver ore and mining options. The Government's case was based on (1) COCKRELL'S demonstration of the so-called "Henderson Process" for the extraction of silver from graphitic schist ore and (2) COCKRELL'S being paid about $8,000.00 by David G. McCord, the Government's chief witness after his plea bargain on charges brought in the same indictment, to equip a plant at Waxahachie to extract silver from x-ray film. Because COCKRELL could not afford to employ counsel, the Court appointed Edith James [hereinafter JAMES] to represent him. JAMES represented COCKRELL at the trial and on appeal. On appeal, COCKRELL'S conviction was affirmed. The opinion is reported in *United States v. Becker*, 569 F.2d 951 (5th Cir. 1977), *cert. denied*, 439 U.S. 865 (1978).

COCKRELL served two years and a few days more than seven months of a fifteen year sentence before being paroled. Prior to his release, he filed a motion to vacate his sentence on grounds that he was denied effective assistance of counsel. The U.S. District Court for the Northern District of Texas granted COCKRELL an evidentiary hearing in response to his motion for release under 28 U.S.C. § 2255. Magistrate John B. Tolle presided over the hearing and submitted written findings of fact and conclusions of law recommending to the District Court that relief be granted. However,

Judge Robert Hill rejected the Magistrate's recommendation and denied relief. On appeal, the United States Court of Appeals for the Fifth Circuit affirmed the District Court. The court denied COCKRELL'S motion for rehearing and suggestion for an en banc hearing.

B. STATEMENT OF THE FACTS

COCKRELL'S defense was JAMES' first federal jury trial. Prior to trial, JAMES consulted frequently with COCKRELL, listing on her fee request 17 hours of client contact out of a total of 190 hours. Client consultation time was devoted to her recitals of personal anecdotes and history; to moving the contents of her office; and to discussion of technical aspects of assaying and evaluating mining prospects. (I Evidentiary Hearing Transcript, 104-107).[1]

JAMES filed numerous motions (Docket Record, docket sheet) and created a research file several inches thick. However, her efforts to prepare a defense were ineffective. Because she failed to properly analyze the Government's case, she failed to interview and call as witnesses persons who submitted affidavits at the § 2255 hearing. Some of the affiants were associated with COCKRELL in the extraction of silver from x-ray film and also attested to his reputation for honesty. Others were character witnesses.

In investigating the facts and preparing for trial, JAMES interviewed only one of several available, potential fact

[1]References conform to those used by the United States Magistrate and the District Court. Testimony from the August 25, 1981 hearing is designated I Evidentiary Hearing Transcript, abbreviated EHT, and testimony from the September 17, 1981 hearing is designated II EHT. References to the trial transcript are designated by volume, I-VI, Trial Transcript, abbreviated T.TR. Reference to the Docket Record is designated Docket Record.

witnesses and contacted no character witnesses.[2] (II EHT, 33, 62-63) Her cross-examination of Government witness McCord shows that she was aware of several potential fact witnesses. (I T.TR., 341-347) However, she relied on the Government's case against COCKRELL being weak because it was based only on the "assay" (demonstration of the "Henderson Process"). (II EHT, 137; I EHT, 104-105, 125) During consultation, JAMES theorized that she should defend COCKRELL by attacking the Government assayers. (I EHT, 105-106) However, she did not obtain the assistance of expert witnesses (*Id.*). JAMES' theory was so tenuous that the Court denied her request to subpoena an engineer from Austin to serve as an expert witness when JAMES could not explain how the testimony would aid the defense. (I EHT, 121-122)

Of the seven persons JAMES asked to subpoena, the court found only three to be material witnesses and authorized only three subpoenaes. One subpoena, to a chemist for the Ledoux Company subpoenaed to testify that his company reported a high silver content in Llano ore, (EHT, 55) was returned because JAMES misnamed the witness.[3]

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[2]JAMES asserted that she interviewed other witnesses. However, the interviews were with persons she encountered at the trial when they appeared to testify for other parties, including the Government. (II, EHT 42, 45, 63, 168) JAMES testified that Ed Walther was the only potential witness she interviewed prior to trial. (*Id.* 63-64)

[3]The Government called the corporate secretary from the same company. JAMES cross-examined him on only these matters:

(1) his acquaintance and correspondence with COCKRELL;

(2) the transmittal of Government Exhibit 6-A to COCKRELL which the witness denied sending;

(3) the method of making a random sample of ore in geographic areas of 120 acres to five counties in size (II T.TR., 689-692).

Further, JAMES identified Cox and White as "material" witnesses (II EHT-40) whom she subpoenaed for the opening day of the trial. When they failed to appear as subpoenaed, JAMES tried unsuccessfully to telephone Cox at the number he left with the clerk. (IV T.TR., 1454) When she reported to the court that he had not answered, JAMES did not delay resting her case to continue her efforts, move for a continuance or move for a writ of attachment for the witnesses. Instead, JAMES announced that COCKRELL waived their presence since the calling had been unsuccessful. (IV T.TR., 1550) The court then asked COCKRELL if the witnesses were unnecessary. Having been advised by JAMES that she could do nothing else to obtain the testimony (II EHT, 171), COCKRELL agreed. Neither the court nor JAMES informed COCKRELL that process could issue to compel the subpoenaed witnesses to appear.[4] (IV T.TR., 1550) As a result of JAMES' errors, COCKRELL was deprived of evidence that he had previously advised a prospective investor against investing in Llano ore or the Henderson process.

JAMES' testimony at the evidentiary hearing on the subject of her formulation of a defense for COCKRELL was as follows:

To establish the harmlessness of her mistake, JAMES erroneously testified at the evidentiary hearing that she had cross examined the witness and introduced a report of his company showing a high silver content to contradict Government evidence that the Ledoux Company found Llano ore to be worthless (II EHT, 56-58).

JAMES' stated purpose for the purported testimony is inexplicable in the light of her defensive theory and the fact that COCKRELL testified that the ore was not commercially exploitable. (IV T.TR., 1477)

[4]The District Court's speculation that it would have denied a motion for a writ because the witness could not be found is unwarranted since the subpoena had been served only four days before.

The defensive theory was that he had simply performed a demonstration, that it was not intended to be an assay and that he was paid simply for doing a demonstration and received no other remuneration and knew nothing about any stock options and conspiracy on anyone else's part to sell the same, that he had done none of that. But he had simply performed a chemical assay as a demonstration, not as an assay result. II EHT, 33.

JAMES further testified that the Government's case was weak and that she had told COCKRELL so:

A. I thought it was. At one point, I thought it was a very poor case, because all they had was that one occasion when he had done that assay, yes, I did. II EHT, 137.

Q. At that stage were you not aware of the fact that the Government might introduce evidence of the seven or eight thousand dollars of checks he received?

A. Yes, I think I was aware of that. And I accepted his explanation, and I'm next to certain that the jury did, too. I don't see any reason why anyone would disbelieve it. II EHT, 137-138.

Previously she had testified as follows:

Q. At the stage before the trial, now, were you aware from the indictment and from your information that you had received at this point that there was likely to be evidence in the trial relating to the Waxahachie Plant, the development of that plant, what it was supposed to do, and the relationship of funds paid to Mr. COCKRELL?

A. No, Sir. Except for the funds paid to Mr. COCKRELL by Mr. McCord, there was no relationship with the Waxahachie Plant to this case that I know of. There was one small assay on a bucket

> of sludge that might have something to do with it. But the Waxahachie plant was for x-ray film entirely as I understood it, was entirely to do with their deal with the x-ray film and had nothing to do with the Llano ore. And Mr. COCKRELL told me that on several occasions. I had the impression that the Waxahachie plant might be involved in this, and of course, I took the information. And Mr. COCKRELL set me straight on that on numerous occasions, that the Waxahachie plant had nothing to do with the case. II EHT 50-51.

COCKRELL's defense was presented solely by his uncorroborated testimony. JAMES testified as follows concerning COCKRELL'S testimony:

1. She was convinced of COCKRELL'S version of the facts about the Waxahachie plant (II EHT, 137-138; for COCKRELL'S statement, *see* I EHT, 73-85.);
2. She didn't see why anyone would disbelieve COCKRELL'S testimony (II EHT, II, 137-138);
3. She found his story "absolutely credible" (II EHT, 113-114);
4. She saw no connection between the Waxahachie plant and the Government's case (II EHT, 50-51);
5. She thought his testimony would go unchallenged by the Government (II EHT, 120);
6. She failed to contact witnesses to corroborate the testimony. (Her testimony was that she thought she tried to contact Pruitt and Stowers). (II EHT 116, 119).

In addition to failing to call available witnesses, JAMES failed to cross-examine Pruitt, a witness presented by another party, on facts essential to COCKRELL'S defense.

(V T.TR., 1864-1892) Pruitt was knowledgable about COCKRELL'S business association with persons and entities, other than those associated with his fellow defendants, in the extraction of silver from x-ray film at the Waxahachie plant. JAMES neither interviewed nor called other witnesses to the same facts, including Stowers. The record shows that JAMES neither opened nor closed with any reference to the Waxahachie Plant evidence. (I T.TR., 141-144; VI T.TR., 1998-2006) The Government alleged and argued that COCKRELL was implicated in the fraud because of the demonstration and because he had received money for the development of the plant. (VI T.TR., 1981)

JAMES decided to present COCKRELL'S defense through COCKRELL'S testimony. (II EHT, 80-81) COCKRELL suggested that evidence of his reputation for honesty would show that the acts charged against him were not consistent with his character. (I EHT, 110-116) However, JAMES rejected the use of character evidence. (II EHT, 196-197; II EHT, 75-76) Actually, COCKRELL had neither criminal convictions nor bad reputation to conceal and could only gain from character testimony. JAMES testified that she did not want to put COCKRELL'S reputation into issue. (II EHT, 75) JAMES did argue COCKRELL'S honesty in her closing (VI T.TR., 2004) but had no evidence to impress upon the jury.

REASONS FOR GRANTING THE WRIT

I.

A finding that appointed counsel was diligent does not satisfy the standard of professional competence established by *McMann v. Richardson.*

This case presents a question of the proper means of determining the adequacy of attorney preparation. Following the admonition of *McMann v. Richardson*, 397 U.S. 759 (1970), that lower courts should set proper standards of competence, the Fifth Circuit established as the proper standard "not errorless counsel, and not counsel judged ineffective by hindsight, but counsel reasonably likely to render *and rendering* reasonably effective assistance of counsel." *MacKenna v. Ellis*, 280 F.2d 592 (5th Cir. 1961), *modified en banc*, 289 F.2d 928 (5th Cir. 1961), *cert. denied*, 368 U.S. 877 (1961). "The methodology for applying the standard involves an inquiry into the *actual performance of counsel* [emphasis added] and a determination based on the totality of the circumstances and the entire record." *Baldwin v. Blackburn*, 653 F.2d 942 (5th Cir. 1981).

Although the court below cited the appropriate test and methodology in deciding COCKRELL'S claim that his counsel failed to investigate and failed adequately to prepare for trial, it utilized a "physical indicia" test that measured diligence rather than effectiveness. The opinion below emphasized, as evidence of consultation and preparation, counsel's total of 190 hours on the case, numerous pretrial motions, a file three or four inches thick, and COCKRELL'S admission that JAMES was diligent. *Cockrell*, 720 F.2d at 1427. COCKRELL'S counsel must be judged effective or ineffective by the norm of professional competence. By focusing on time and materials amassed by counsel and omitting any reference to JAMES' failure to investigate potential defenses, the court below has departed from the *McMann* standard of professional competence and substituted diligence for effectiveness.

The Fifth Circuit opinion did not discuss COCKRELL'S claim that JAMES failed to adequately investigate the case.

As to the claim of failure to consult and to prepare, the record shows JAMES spent time on pretrial motions, on research, on reviewing evidence and FBI reports, and in meetings with COCKRELL. COCKRELL acknowledges JAMES' efforts but asserts that the activity was misdirected. The record shows virtually no time devoted to developing available, affirmative evidence of innocence. JAMES interviewed only one fact witness. Her cross-examination of Government witnesses shows that other potential witnesses were known to her. JAMES testified at the evidentiary hearing that she rejected the use of character testimony. She contacted no witnesses, prepared no witnesses to testify and called no character witnesses to refute charges of fraud and dishonesty. JAMES presented no affirmative evidence other than COCKRELL'S testimony to rebut Government evidence that COCKRELL had a financial stake in the fraudulent scheme.

The physical indicia of JAMES' activities are not objective evidence of effectiveness or of professional competence in defense of COCKRELL. The essence of the constitutional guarantee is that the accused have a professional practitioner analyze the charges and the facts, apply the law, investigate potential defenses, interview and select witnesses, design a defensive strategy and participate as an advocate in the proceedings.

The physical indicia test adopted by the Fifth Circuit that measures effectiveness by the many motions, the number of hours and the size of the file should be rejected. The standard applied by the Fifth Circuit does not serve to safeguard the interest of the accused, to protect the revenues of the Government which compensates appointed counsel, or to implement the Sixth Amendment guarantee of assistance of counsel. Examining the physical indicia of investiga-

tion and preparation cannot substitute for an examination of the assistance actually rendered. The proof of the pudding is in the eating, not in an inventory of the kitchen. The physical indicia test measures only the superficial and not the actual effectiveness of counsel. The ultimate result of the opinion below will be to encourage well documented, pro forma efforts of appointed counsel that will increase Government expense in providing counsel for indigents, provide the accused with only superficial aid, and erode the constitutional guarantee of effective assistance of counsel.

COCKRELL urges the Court to overrule the physical indicia test utilized by the Fifth Circuit and to establish a test requiring inquiry into and examination of the actual performance of counsel in claims of failure to investigate and to prepare for trial. Otherwise, society's goal of providing professional aid to persons prosecuted by professional prosecutors will be frustrated. Defense counsel, assured that their ultimate performance may escape scrutiny if they amass enough physical indicia of activity, will busy themselves with easily documented efforts without fear that the courts will detect the lack of substantial assistance to the accused. The Sixth Amendment guarantee cannot be achieved by substituting diligence for competence as the test for effective assistance of counsel. This Court should grant certiorari to prevent effective assistance of counsel from being determined by the dimensions of the paper trail created by counsel.

II.

Where a defendant claims ineffective assistance for failure to investigate and for failure to present fact and character witnesses, the uncalled witness claim must be examined in the light of counsel's duty to investigate plausible defenses available to the accused.

The lower court's narrow focus in reviewing the competence of COCKRELL'S appointed counsel and failure to apply its recent analysis of the duty of counsel to investigate as formulated in *Washington v. Strickland*, 693 F.2d 1243 (5th Cir. 1982), are unwarranted. The Fifth Circuit opinion merely listed COCKRELL'S claim of failure to investigate within its reiteration of the District Court's statement of the grounds for the motion[5] and did not discuss or analyze the legal conclusions rejecting his claim. Moreover, COCKRELL'S claim regarding failure to call fact and character witnesses was reduced to a discussion of two particular witnesses. The variance from COCKRELL'S broad claim to the more narrow consideration of JAMES' failure to present the two named witnesses began with the opinion of the district court. The Magistrate found JAMES ineffective for failing to call fact and character witnesses and recommended relief. He merely singled out the two named witnesses as "the most crucial" among numerous other witnesses who were available and who were not called. *See* Appendix C, pages 5-6.

The court below failed to realize that JAMES' failure to investigate plausible lines of defense led to her failure to present available fact and character witnesses.

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[5]COCKRELL moved for relief on five grounds, three of which are pertinent to this petition:

(1) counsel failed to conduct adequate consultation with Cockrell prior to and during the trial and upon the appeal of the conviction;

(2) counsel failed to investigate adequately the facts of the case, failed to research adequately the applicable law and failed to prepare adequately for trial and for appeal;

(3) counsel failed to consult with or to call any of Petitioner's potential fact and character witnesses.

COCKRELL has been free from imprisonment since his parole in 1981, after serving two years and a little more than seven months of a fifteen year sentence. In support of his motion to set aside his wrongful conviction, COCKRELL presented to the convicting court affidavits of sixteen fact and character witnesses not called by his appointed attorney. Although the "conspiracy to defraud" count in the indictment, supported by the testimony of a plea bargaining codefendant, is a formidable charge, overwhelming evidence of Petitioner's guilt does not exist in this case. This Court in *United States v. Frady*, 456 U.S. 152 (1982), noted that claims of attorney incompetence pressed on procedural grounds in cases with strong evidence of guilt are less favored than cases, such as this, of wrongful conviction of an innocent defendant. Moreover, in the absence of overwhelming evidence of guilt, prejudice from counsel's errors is more likely than not to exist.

As noted by the Fifth Circuit in *Washington v. Strickland*, "Ultimately, the courts are concerned that counsels' decision reflect 'informed, professional deliberation' rather than 'inexcusable ignorance or senseless disregard of their clients' rights.' " 693 F.2d at 1251, quoting *United States v. Bosch*, 584 F.2d 1113, 1122 (1st Cir. 1978). In *Washington v. Strickland*, the court examined the duty of counsel to investigate in the light of strategic choices available to counsel. The court canvassed precedent and identified five lines of "duty to investigate" cases. In each, the court considered "the proper role that counsel's strategy plays in the evaluation of the reasonableness of pretrial investigation." *Id.*, 1252. The court found counsel's actions in preparing the case to be decisive and reiterated the requirement that "effective counsel conduct a reasonable amount of pretrial investigation." *Id.*, 1251.

Washington's claims and COCKRELL'S claims each allege failure to investigate and to present witnesses. Washington sought relief from a state conviction in § 2254 proceedings. He alleged that his appointed counsel failed at the sentencing phase of his guilty plea to charges of murder "to investigate fully and develop character evidence" to show mitigating circumstances. *Id.*, 1247. He presented fourteen affidavits of friends, relatives and acquaintances who would have testified for him and the reports of two psychiatrists who attested to his chronic frustration and depression. The District Court found ineffectiveness but no prejudice. The Fifth Circuit panel opinion found ineffectiveness but refused relief because Washington did not show that "but for his counsel's ineffectiveness, his trial but not necessarily its outcome would have been altered in some way helpful to him." *Washington v. Strickland*, 673 F.2d 879, 902 (5th Cir. 1982). The Fifth Circuit rejected the panel's reasoning and enunciated a standard of prejudice requiring petitioner to show that the defense was actually and substantially disadvantaged by the ineffectiveness of counsel. This Court has granted certiorari in the case and shown particular interest in the showing of prejudice required to set aside a conviction.

COCKRELL moved in § 2255 proceedings to have his conviction set aside, alleging that his appointed counsel failed to investigate and prepare a defense and to present both fact and character witnesses on his behalf. He submitted the affidavits of sixteen witnesses who would have testified for him. However, in COCKRELL'S case, the unpresented evidence was vital to the determination of guilt, not to sentencing. Moreover, Washington pled guilty whereas COCKRELL has consistently maintained his innocence and has sought relief from the conviction even though he is freed from confinement.

More important, prejudice is clear in COCKRELL'S case. Without the unpresented witnesses and because of other errors of his counsel in failing to name a witness properly on a subpoena and to seek process to compel the appearance of subpoenaed witnesses, COCKRELL had only his own testimony to put before the jury. He lacked rebuttal evidence against Government allegations that he had a financial interest in the fraudulent scheme and character evidence which is legally sufficient to raise a reasonable doubt. COCKRELL'S defense was seriously impaired because appointed counsel failed in the basic duties of reasonably competent counsel.

JAMES' reasons for not calling known witnesses, derived from her testimony at the § 2255 hearing and exemplified by omissions in her opening and closing arguments, are not strategic. The unpresented evidence constitutes a plausible line of defense for COCKRELL, not inconsistent with the defense JAMES espoused, which was never explored because she did not properly analyze the Government's case or understand the use of character evidence. JAMES' faith in her client's innocence immobilized her as effectively as did the feeling of hopelessness that overcame Washington's counsel when he learned that Washington had confessed to two more murders.

In spite of the identity of issues raised by COCKRELL to those raised by Washington, the Fifth Circuit failed to apply the reasoning of *Washington v. Strickland* to COCKRELL. The court below was derelict in protecting COCKRELL'S right to effective assistance of counsel. In reviewing Washington's claim of failure to present character testimony, the Fifth Circuit evaluated the claim in the light of the duty to investigate and counsels' apparent strategic choices. However, the same court unfairly withheld such

analysis of COCKRELL'S almost identical claim of failure to present both fact and character witnesses. Ignoring the axiom of *Washington v. Strickland*, 693 F.2d at 1257, that uninformed choices can never be strategic, the court reasoned that "the presentation of testimonial evidence is a matter of trial strategy." *Cockrell*, 720 F.2d at 1427, quoting *Buckelew v. United States*, 575 F.2d 515, 521 (5th Cir. 1978). The practical result of allowing the court below to disregard precedent is to confuse the law and confound lower courts that hear ineffective assistance claims.

By completely disregarding COCKRELL'S claim of failure to investigate, the Fifth Circuit judged counsel's failure to call fact and character witnesses as if the omission resulted from strategic choice. If the decision is allowed to stand, other courts will arbitrarily disregard select claims, focus attention away from pervasive and causative conduct, cloak incompetent performance in the veil of strategic choice and allow incompetence to masquerade as effectiveness.

The Fifth Circuit opinion stands for the specious proposition that less than competent performance can be rationalized by disassociating results from causes. Such an approach discounts the fundamental requirement that counsel learn the facts of the case and research the law in order to properly advise his client and function as an advocate in the adversary process. Because the record in COCKRELL'S case shows that counsel's misanalysis of the Government's case and misunderstanding of the rules of evidence resulted in uninformed, nonstrategic choices in the selection of witnesses, the Fifth Circuit opinion in the COCKRELL case should not be allowed to stand.

Washington v. Strickland is presently before this Court on certiorari. If this Court upholds the categorical rules

established in *Washington v. Strickland*, as a standard for determining whether counsel has discharged its duty to investigate, the COCKRELL opinion will encourage other courts to avoid application of the "duty to investigate" analysis by divorcing the results from the cause. If this Court rejects the categorical approach in favor of broad guidelines for measuring performance of counsel in a particular case, the Fifth Circuit opinion will chart the course for courts to analyze the superficial rather than the actual performance of counsel. This Court should grant certiorari in this case regardless of its decision in *Washington v. Strickland* in order to prevent faulty precedent from misleading other courts in ineffective assistance cases.

III.

The failure of appointed counsel to present substantive evidence of innocence through available character witnesses deprived the accused of effective assistance of counsel.

By labeling character witnesses "non-crucial", the opinion of the Court below conflicts with common law evidentiary rules, the Federal Rules of Evidence and principles accepted by this Court in *Michelson v. United States*, 335 U.S. 469 (1948). Allowing the decision to stand as precedent will foster further such conflict and will erode the principle of professional competence as the test for effective assistance of counsel.

The record establishes that JAMES interviewed no character witnesses and made no preparation for the use of character testimony. COCKRELL was accused of conspiracy to defraud and mail and wire fraud. Honesty is a trait of character pertinent to the charge of fraud.

Because of JAMES' failures to perceive the need to rebut Government evidence related to the Waxahachie Plant and to secure the testimony of subpoenaed witnesses and to present character testimony, the only affirmative evidence presented by JAMES in COCKRELL'S defense was COCKRELL'S testimony.

COCKRELL testified that JAMES told him character testimony was of no value until his reputation was placed in issue. JAMES testified that she "didn't choose to put his reputation as such into issue." (II EHT, 75) However, COCKRELL had no criminal record or bad reputation to conceal. The choice was not the result of trial strategy but of ignorance of the rules of evidence regarding character testimony. JAMES testified that character testimony is introduced "after somebody's truth and veracity have been attacked as a rule" (II EHT, 76) and that COCKRELL'S reputation had not been attacked. JAMES' testimony states the condition required by Rule 608 before reputation evidence can be used to support an impeached witness. JAMES was unaware that Rule 404 (a) (1) allows character evidence to prove that the defendant acted in conformity with the relevant trait. See Appendix E.

Regarding character witnesses, the court below concluded that "character witnesses, unlike eyewitnesses, usually are not crucial," citing *Gray v. Lucas*, 677 F.2d 1086, 1094 (5th Cir. 1982), *cert. denied*, — U.S. — 103 S.Ct. 1886, (1983). *Cockrell*, 720 F.2d at 1428. However, *Gray* merely states that witnesses Gray claimed should have been interviewed were not "eyewitnesses" to the crime and therefore "crucial to the defense of the case." Moreover, Gray was prosecuted for murdering a three year old child, and the omitted testimony, described by the court as marginally effective, was important

only to show mitigating circumstances. In rejecting COCKRELL'S claim the court below has ignored JAMES' testimony as to why she called no character witnesses, the traditional role of character testimony in defense of fraud charges, and dissimilarity of the Gray case to COCKRELL'S case.

This court's decision in *Michelson v. United States* states the following principles of evidentiary rules on character testimony:

(1) Allowing the prosecution to present evidence of bad character may prejudice a jury and deny a defendant a fair opportunity to defend against a particular charge.

(2) Character is relevant to resolving probabilities of guilt.

(3) The accused may present affirmative evidence of character.

(4) The accused may ask the jury to infer that the charged act is inconsistent with his character.

(5) Such evidence may raise a reasonable doubt.

(6) A federal defendant is entitled to a jury instruction on reasonable doubt.

A reasonably competent attorney knows these principles. For defense of crimes of dishonesty, testimony of a reputation for honesty is essential to adequate representation. The Fifth Circuit's casual dismissal of character testimony in a fraud prosecution lowers the degree of competence required of counsel to an unacceptable level. Character testimony is substantive evidence of innocence and can raise a reasonable doubt of guilt. Where no strategic reason exists for counsel's rejection of the use of character testimony, failure to present available character witnesses undeniably impairs the defense. Allowing this decision to stand will make the rules of

evidence on character testimony unavailable to criminal defendants.

Counsel's role is to advise and aid the accused in preparing and presenting a defense. *Powell v. Alabama*, 287 U.S. 45, 69 (1933). Neither the constitutional guarantee nor the ends of justice will be served by excusing the error of counsel in advising the accused to face prosecution without the benefit of evidence which is legally sufficient to raise a reasonable doubt. Knowledge of basic, fundamental, "black-letter" law is required for professional competence. This Court, which has equated effective assistance with professional competence, should grant certiorari to promote achievement of the standard of professional competence.

IV.

To establish prejudice from the failure of counsel to present available fact and character witnesses, the defendant is not required to show that the outcome of his trial would have been altered by the unpresented testimony.

The Fifth Circuit opinion in COCKRELL'S case discussed prejudice only on COCKRELL'S claim that JAMES failed to call potential fact and character witnesses. With respect to the element of prejudice from the failure of witness Cox to testify, the court below stated that COCKRELL failed to show "that Cox's testimony would have substantially altered the outcome of the trial." *Cockrell*, 720 F.2d at 1427.

An "outcome determinative" test has never been adopted in the Fifth Circuit. In *Washington v. Strickland*, the Fifth Circuit en banc rejected the "outcome determinative" standards, applied in the District of Columbia Circuit in *United*

States v. DeCoster, 487 F.2d 1197 (1973), that was adopted by the panel that reviewed Washington's claim of failure to investigate and failure to call witnesses. The en banc opinion adopted the "actual and substantial disadvantage" test established for procedural default cases in *United States v. Frady*, 456 U.S. 152 (1982). The court held that "the petitioner must show that ineffectiveness of counsel resulted in actual and substantial disadvantage to the course of his defense." *Washington v. Strickland*, 693 F.2d at 1262.

The Fifth Circuit has either abandoned its recent adoption of the "actual and substantial disadvantage" test or has unfairly imposed upon COCKRELL a higher requirement to show that the outcome of his case would have been different had the evidence been presented.

The court's treatment of the issue of the unpresented witnesses is an indictment of the outcome determinative test. Although the court chides COCKRELL for speculation about the unproduced testimony,[6] it is the court that speculates and engages in a subjective exercise of how the factfinder might have received the evidence. The outcome determinative test invites such subjective speculation. However, the "actual and substantial disadvantage" test likewise encourages such speculation and is inappropriate, except perhaps in cases of procedural default. No certain conclusion about the court's reasoning can be drawn from the Fifth Circuit's extensive examination of the need for a prejudice require-

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[6]Although COCKRELL was not able to present an affidavit from Cox, both he and his counsel testified that Cox would have testified that COCKRELL had previously advised Cox not to invest in the Henderson process or Llano ore. (II EHT, 28; I EHT, 113) Moreover, the court, in authorizing a subpoena at government expense, had previously found the witness to be material to COCKRELL'S defense.

ment in *Washington v. Strickland* and the absence of such treatment in COCKRELL'S case. The fact is that the court below applied to COCKRELL the outcome determinative test that it had rejected only months before. Allowing the COCKRELL opinion to stand will confuse courts as to the required showing of prejudice in the Fifth Circuit.

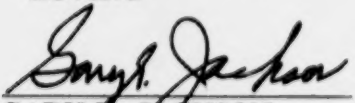
Moreover, the showing of prejudice required in ineffective assistance of counsel cases varies among the circuits. This Court should grant certiorari to decide how much, if any, prejudice must be shown when counsel fails to present available, affirmative evidence in defense. Only this Court can act definitively to insure uniformity among the circuits and establish standards sufficient to protect Sixth Amendment rights.

CONCLUSION

For these reasons, COCKRELL prays that the petition for certiorari to the United States Court of Appeals for the Fifth Circuit issue.

Respectfully submitted,

JACKSON, JACKSON &
LOVING



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Attorney for Petitioner

CERTIFICATE OF SERVICE

I, Gary D. Jackson, one of the attorneys for Petitioner herein, and a member of the Bar of the Supreme Court of the United States, hereby certify that on the 9th day of March, 1984, I served the requisite number of copies of the foregoing Petition for Writ of Certiorari on all parties required to be served, by depositing same in the United States mail, first class, postage prepaid, at their respective post office addresses:

Rex Lee
Solicitor General of the United States
Department of Justice
Washington, D.C. 20530

Gary D. Jackson

UNITED STATES of America,
Plaintiff-Appellee

v.

James COCKRELL,
Defendant-Appellant.

No. 82-1625.

United States Court of Appeals,
Fifth Circuit.

Dec. 16, 1983.

The United States District Court for the Northern District of Texas at Dallas, Robert M. Hill, J., denied relief in habeas corpus to a federal prisoner. The prisoner appealed. The Court of Appeals, Jerre S. Williams, Circuit Judge, held that: (1) district court's determinations whether counsel's actions were strategic and reasonable were determinations of questions of fact and were to govern unless clearly erroneous; (2) findings that there was adequate consultation and preparation by counsel, that defendant's military record was properly brought to light and that defendant was not prejudiced by his having been sent to retrieve some documents just before he testified were sustained by the record; and (3) no inadequacy of counsel was shown in alleged failure to call witnesses.

Affirmed.

1. Habeas Corpus — 85.5(11)

Habeas petitioner claiming ineffective assistance of counsel bears burden of demonstrating by preponderance of evidence both an identifiable lapse on part of his trial counsel and some actual, adverse impact upon fairness of his trial resulting from that lapse. 28 U.S.C.A. § 2255; U.S.C.A. Const. Amend. 6.

2. Habeas Corpus — 113(12)

Court of Appeals was bound to make independent review of district court's ultimate conclusion, in habeas corpus case, that counsel had been effective, since conclusion required decision as to presence of constitutional violation, but findings of fact would be accepted where not clearly erroneous, including determinations as to whether actions of counsel were strategic and reasonable. 28 U.S.C.A. § 2255; U.S.C.A. Const.Amend. 6.

3. Habeas Corpus — 85.5(11)

Findings that there was adequate consultation and preparation by counsel, that defendant's military record was properly brought to light and that defendant was not prejudiced by his having been sent to retrieve some documents just before he testified were sustained by the record. 28 U.S.C.A. § 2255; U.S.C.A. Const.Amend. 6.

4. Habeas Corpus — 25.1(6)

Defense counsel was not to be faulted for default of errant witness, and in view, also, of fact that defendant waived presence of witness in open court and informed court that testimony of such witness would not be necessary, defendant was not entitled to relief for failure of witness to appear or for alleged failure of counsel to call essential fact witnesses. 28 U.S.C.A. § 2255; U.S.C.A. Const.Amend. 6.

5. Habeas Corpus — 25.1(4)

Defendant's speculations as to what errant witness might have been able to contribute through his testimony were insufficient to establish prima facie showing that testimony would have substantially altered outcome of trial.

6. Habeas Corpus — 25.1(6)

District court's finding that decision of defense counsel that testimony of third witness would have been simply cumulative to testimony which she anticipated obtaining

was informed practical choice could not be overturned, being not clearly erroneous, nor could such tactical choice be basis for habeas corpus proceedings simply because in hindsight it appeared mistaken. 28 U.S.C.A. § 2255; U.S.C.A. Const. Amend. 6.

7. Habeas Corpus — 85.5(11)

District court's finding that any possible benefit of testimony of absent witness would have been undermined and would have supported rather than weakened an inference sought by the Government was sustained by the record and was not basis for relief in habeas corpus. 28 U.S.C.A. § 2255; U.S.C.A. Const.Amend. 6.

8. Criminal Law — 641.13(6)

A lawyer's failure to investigate witness who has been identified as crucial may indicate inadequate investigation, but failure to investigate everyone whose name happens to be mentioned by defendant does not suggest ineffective assistance, and failure to call character witnesses does not mandate finding of ineffective assistance of counsel. 28 U.S.C.A. § 2255; U.S.C.A. Const.Amend. 6.

Appeal from the United States District Court for the Northern District of Texas.

Before GARZA, WILLIAMS, and HIGGINBOTHAM, Circuit Judges.

JERRE S. WILLIAMS, Circuit Judge.

Petitioner, James Cockrell, was convicted in the United States District Court for the Northern District of Texas of conspiracy to defraud in violation of 18 U.S.C. § 371 and fifteen substantive offenses committed in furtherance of the conspiracy, consisting of mail fraud, wire fraud and interstate transportation of checks taken by fraud, in violation of 18 U.S.C. §§ 1341, 1343, and 2314. This Court affirmed that conviction on appeal. *See United States v. Becker*, 569

F.2d 951 (5th Cir.), *cert. denied*, 439 U.S. 865, 99 S.Ct. 188, 58 L.Ed.2d 174 (1978). Cockrell now petitions for relief in the nature of habeas corpus under 28 U.S.C. § 2255. The district court denied relief, and we affirm.

I. FACTS

The evidence adduced at trial showed that Cockrell and four other alleged co-conspirators engaged in a complex scheme to induce investments in the form of silver options, refining contracts, loan advance fees, and loans to facilitate the profitable mining of silver and other precious metals from low-grade graphitic schist ore. Cockrell's participation in the scheme involved meetings with potential investors and a demonstration of the "secret Henderson process" — reputedly designed to extract from ore exceptionally high amounts of silver at low cost. Cockrell also produced a written report at the demonstration verifying the recovery obtained as 980 ounces of silver per ton of ore. The report did not mention that the recovery was five times higher than any level Cockrell had ever previously achieved. The government contended that the ore was of little value and that the co-conspirators knowingly misrepresented the potential yield from the ore in order to deceive potential investors.

Cockrell's connection with the conspiracy was further bolstered by the government's proof that he had worked as a consultant and processor for fellow conspirator David McCord at an extracting and refining plant near Waxahachie, Texas. The government contended that Cockrell was willing to forego a set fee in exchange for access to the plant building in Waxahachie plus irregular payments and reimbursements amounting to approximately $8,000. Cockrell, therefore, had a financial stake in the success of the fraudulent scheme. Cockrell maintained that he had no knowledge of any fraud or conspiracy and that his part was limited to the demonstration of the Henderson process to an unidentified audience for the sum of $100.

Cockrell was represented by appointed counsel, Edith James. He received a fifteen year sentence, and served five

years before obtaining parole. Subsequent to his conviction and appeal, Cockrell filed a motion under 28 U.S.C. § 2255, asking the court to vacate his sentence on the ground that he was denied effective assistance of counsel. The district court referred the case to a magistrate. The magistrate conducted a full evidentiary hearing and outlined the following grounds as the basis for Cockrell's claim:

(1) counsel failed to conduct adequate consultation with Cockrell prior to and during the trial and upon the appeal of the conviction;

(2) counsel failed to investigate adequately the facts of the case, failed to research adequately the applicable law, and failed to prepare adequately for trial and for appeal;

(3) counsel failed to consult with or to call any of the petitioner's potential fact and character witnesses;

(4) counsel failed to call attention to petitioner's impressive military record; and

(5) counsel was guilty of conduct which embarrassed the petitioner and rendered his trial unfair.

The magistrate found grounds 1, 2, 4 and 5 to be without merit. He recommended, however, that § 2255 relief be granted based on trial counsel's failure to locate and call two witnesses. The district court declined to accept the magistrate's recommendation and ordered that no relief be granted under § 2255. Cockrell appeals from that order.

II. STANDARD OF REVIEW

[1] We must decide whether petitioner has been deprived of his constitutional right under the Sixth Amendment to the effective assistance of counsel. The constitutional requirement does not demand errorless counsel, but rather "counsel reasonably likely to render and rendering reasonably effective assistance, given the totality of the

circumstances." *Hayes v. Maggio*, 699 F.2d 198, 201 (5th Cir.1983); *Washington v. Strickland*, 693 F.2d 1243, 1250 (5th Cir.1982) (en banc), *cert. granted*, — U.S. —, 103 S.Ct. 2451, 77 L.Ed.2d 1332 (1983); *Washington v. Watkins*, 655 F.2d 1346, 1356 (5th Cir.1981), *cert. denied*, 456 U.S. 949, 102 S.Ct. 2021, 72 L.Ed.2d 474 (1982). A habeas petitioner claiming ineffective assistance of counsel bears the burden of demonstrating by a preponderance of the evidence "both an identifiable lapse on the part of his trial counsel and some actual, adverse impact upon the fairness of his trial resulting from that lapse." *Boyd v. Estelle*, 661 F.2d 388, 389-90 (5th Cir. 1981); *Washington v. Strickland, supra*, 693 F.2d at 1250, 1258. As indicated, individual lapses of trial counsel are not sufficient to constitute ineffective assistance of counsel if, when considering the totality of the circumstances in the record, counsel's inadequacy did not fundamentally prejudice the petitioner's right to a fair trial. *Ibid. See also Nelson v. Estelle*, 642 F.2d 903, 907-08 (5th Cir.1981).

[2] We are required to make an independent review of the district court's ultimate conclusion that counsel has been effective because this conclusion requires a decision as to whether or not there is a constitutional violation. But as to the facts upon which that conclusion is to be based, we accept the district court's findings of fact unless clearly erroneous. *Bell v. Watkins*, 692 F.2d 999, 1008 (5th Cir.1982), *cert. denied*, — U.S. —, 104 S.Ct. 142, 77 L.Ed.2d — (1983); *Washington v. Watkins, supra*, 655 F.2d at 1354. Consequently, the district court's determinations of whether counsel actions were strategic and reasonable are questions of fact that should govern unless they are clearly erroneous. *Washington v. Strickland, supra*, 693 F.2d at 1256 in. 23, 1257 n. 24.

III. CLAIMS ONE, TWO, FOUR AND FIVE

[3] Applying the well-established principles to this case, we find no error in the district court's acceptance of the magistrate's conclusion that claims 1, 2, 4 and 5, as set out *supra*, are not supported by the record. As to the claims of

inadequate consultation and preparation, the district court found that James devoted approximately 190 hours to the preparation and trial of the case. Seventeen of these hours were spent conferring with Cockrell personally. The record indicates that during the course of her representation of Cockrell, James accumulated a massive amount of cases and other legal research, creating a file described as being three or four inches thick. The record is also replete with numerous pretrial motions filed on Cockrell's behalf. A motion for bond reduction successfully eliminated a cash bond and Cockrell was released on personal recognizance. In addition, the district court noted that Cockrell admitted in the evidentiary hearing that James' work had been "very diligent."

Cockrell's claim that his military record was not properly brought to light is also unfounded. James elicited from Cockrell at trial that he had served in World War II, had attained the rank of captain, and had been a German prisoner of war. Any claim that further amplification would have substantially aided Cockrell's case is totally speculative and thus does not merit relief. *See Baldwin v. Blackburn*, 653 F.2d 942, 947 (5th Cir.1981), *cert. denied*, 456 U.S. 950, 102 S.Ct. 2021, 72 L.Ed.2d 475 (1982) (courts considering habeas petitions are not required to accept blindly speculative claims).

Cockrell also complains that minutes before he was to testify, James sent him to her car to retrieve some documents relating to his impending testimony. Cockrell argues that as a result of this unexpected errand, he appeared red-faced, out of breath, and angry before the jury so much so that his appearance prejudiced his case. We agree with the district court that this claim is "wholly unsubstantial." The record shows that Cockrell was sent on the errand during a 25 minute recess, that he responded extensively to questions asked, and that he did not request a drink of water until after approximately nine pages of testimony. More important, Cockrell made no showing as to how his testimony would have been altered or supplemented if he had not been sent on the errand.

IV. CLAIM THREE — FAILURE TO CALL WITNESSES

[4] The claim which caused the magistrate to recommend granting § 2255 relief is based on his assertion that James failed to call essential fact witnesses, Micky Cox and Harvey Stowers.

Petitioner contends that Cox would have testified that petitioner had advised him against investing in the Henderson process. Petitioner argues that by this testimony, he could have shown that he had advised a potential investor against investing because of the speculative nature of the process. Such evidence in turn would support his contention that he did not know that other persons were being swindled by McCord and the other co-conspirators. The record shows that Cox was served with a subpoena four days before he was to appear to testify. Although he talked to Cockrell after receiving the subpoena, he never gave any indication to Cockrell or James that he would not appear. Cox failed to appear on the day of trial, but left a note for James to call him.

Cockrell concedes that James attempted without success to locate Cox that day. Although a motion for continuance or a writ of attachment could have been requested to secure Cox's appearance, Judge Hill noted that it was unlikely that either request would have been granted since Cox could not be found. Of greater importance is the showing in the record that Cockrell waived Cox's presence in open court and informed the court that Cox's testimony would not be necessary. We agree with the district court's conclusion that James took reasonable steps to secure the presence of Cox. As Judge Hill noted, "James cannot be faulted for the default of an errant witness."

[5] Equally important is the fact that Cockrell has failed to satisfy the requirement of a showing of prejudice resulting from Cox's absence. This Court has emphasized that "complaints of uncalled witnesses are not favored, because the presentation of testimonial evidence is a matter of trial

strategy, and because allegations of what a witness would have testified are largely speculative." *Buckelew v. United States*, 575 F.2d 515, 521 (5th Cir.1978). *See also Boyd v. Estelle, supra*, 661 F.2d at 390; *Washington v. Watkins, supra*, 655 F.2d at 1363-64. Cox has never appeared in any proceeding involving Cockrell, nor has Cockrell produced an affidavit from Cox suggesting the content of his projected testimony. In similar circumstances, this Court has viewed with great caution claims of ineffective assistance of counsel wher the only evidence of a missing witness's testimony is from the defendant. *See, e.g., United States v. Guerra*, 628 F.2d 410, 413 (5th Cir.1980), *cert. denied*, 450 U.S. 934, 101 S.Ct. 1398, 67 L.Ed.2d 369 (1981) ("None of the alleged witnesses were called at the § 2255 hearing and no one knows what they would have testified to. All we have is what Guerra says they would have said.").

Cockrell's own speculations as to what Cox might have been able to contribute through his testimony are insufficient to establish a prima facie showing that Cox's testimony would have substantially altered the outcome of the trial. It bears noting that Cockrell's contention concerning Cox's testimony rests on intrinsically shaky ground. Since Cockrell claims he was dissuading Cox from investing in the Henderson process, the question might well have arisen in the jurors' minds as to why Cockrell had not also given the same advice to other potential investors at the demonstration or why he had not included such disclaimers in his written report. The strong inference could be that Cockrell intended to aid in defrauding investors at the Henderson process demonstration.

[6] We turn our attention to the proposed Stowers testimony. Stowers' affidavit reflects that he would have testified that he had installed and worked on machinery and equipment for petitioner for use at the Waxahachie plant and that petitioner had paid him for parts and labor. Cockrell argues that this testimony would have tended to corroborate his claim that the money he received from David McCord was not for his own use and benefit but was for the purpose of

paying for services and equipment at the Waxahachie plant. We initially note that James testified that Cockrell failed to supply her with information on Stowers' whereabouts and that her own attempts to locate him were futile. Although James submitted a request to have Stowers subpoenaed, she subsequently withdrew this request because she decided to use Cockrell's limited number of government-funded subpoenaes on those individuals whose testimony she believed was more important.[1]

James had decided that Stowers' testimony would have simply been cumulative to the testimony she anticipated obtaining from McCord and Cockrell to explain the purpose of the checks McCord issued to Cockrell. The district court's finding that this was an informed tactical choice cannot be overturned since it is not clearly erroneous. *Washington v. Strickland, supra,* 693 F.2d at 1257 n. 24. Moreover, such a tactical choice cannot be the basis for habeas corpus relief simply because in hindsight it appears mistaken. *Baldwin v. Blackburn, supra,* 653 F.2d at 946.

[7] Even if James was unreasonably mistaken in her estimation of the supposed scope of Stowers' testimony, Cockrell failed to show that his case was substantially prejudiced by Stowers' absence. The record shows that both Cockrell and McCord laboriously explained the source and purpose of each check Cockrell received. Further, the district court noted that any possible benefit of Stowers' testimony "would have been undermined by his own statement that when cash flow faltered, he and Cockrell renegotiated his compensation plan with the assurance that Stowers would share a portion of Cockrell's eventual gain from the project." The district court reasoned that "[t]his supports, rather than weakens, the government's sought after inference that

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[1]James received permission to issue three subpoenas at the government's expense. Two were used. Neither of the two witnesses subpoenaed appeared at trial. The third subpoena was apparently returned unserved, but James was able to obtain testimony similar to what she expected to obtain from this third witness by cross examining a witness who was from the same company.

Cockrell expected to realize a share in the fruits of the fraud and that he was willing to make initial sacrifices disproportionate to any profit sharing arrangement for the legitimate sales of silver." We agree with this assessment.

[8] Finally, we agree with the district court's conclusion that James' decision not to call other fact and character witnesses does not rise to the level of constitutionally ineffective assistance of counsel. James testified that she was unable to contact most of the witnesses mentioned by Cockrell due to a lack of information as to where they could be located. In *Lovett v. State of Florida*, 627 F.2d 706, 708 (5th Cir.1980), we concluded that counsel is "not required to pursue every path until it bears fruit or until all conceivable hope withers." Further, as we noted in *Gray v. Lucas*, 677 F.2d 1086, 1093 n. 5, (5th Cir.1982), *cert. denied*, — U.S. —, 103 S.Ct. 1886, 76 L.Ed.2d 815 (1983), while a lawyer's failure to investigate a witness who has been identified as crucial may indicate an inadequate investigation, the failure to investigate everyone whose name happens to be mentioned by the defendant does not suggest ineffective assistance. In *Gray* we also recognized that character witnesses, unlike eyewitnesses, usually are not crucial. Counsel's failure to call character witnesses does not mandate a finding of ineffective assistance of counsel. *Id.* at 1094.

The record shows that James is an experienced criminal defense attorney who had handled more than 200 criminal cases prior to representing Cockrell. As the district court noted, she devoted many hours to researching the law and other documents relating to the case and consulting personally with Cockrell. Cockrell in fact admitted that he had no trouble contacting James to consult with her regarding his case. The record indicates that she even attempted to visit, at her own expense, the mining site in Llano, Texas. It is clear that she had developed a defensive strategy. Even though this strategy was unsuccessful, a strategy is not proved wrong because, if as is the usual circumstance, a guilty person is convicted. We have repeatedly stated that a counsel should not be judged ineffective by hindsight.

Herring v. Estelle, 491 F.2d 125, 127 (5th Cir.1974). We conclude, based on the totality of these circumstances, that Cockrell was not deprived of his constitutional right to adequate counsel in this case. The petition for § 2255 relief was properly denied.

AFFIRMED.

U.S. Court of Appeals
FILED
January 19, 1984
Gilbert F. Ganucheau
Clerk

In The
United States Court of Appeals
FOR THE FIFTH CIRCUIT

No. 82-1625

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

versus

JAMES COCKRELL,
Defendant-Appellant.

Appeal from the United States District Court for the Northern District of Texas

ON PETITION FOR REHEARING AND SUGGESTION FOR REHEARING EN BANC

(Opinion December 16, 1983, 5 Cir., 198... , ... F.2d .....)

(JANUARY 19, 1984)

Before GARZA, WILLIAMS and HIGGINBOTHAM,

Circuit Judges.

PER CURIAM:

(X) The Petition for Rehearing is DENIED and no member of this panel nor Judge in regular active service on the Court having requested that the Court be polled on rehear-

ing en banc, (Federal Rules of Appellate Procedure and Local Rule 35) the Suggestion for Rehearing En Banc is DENIED.

( ) The Petition for Rehearing is DENIED and the Court having been polled at the request of one of the members of the Court and a majority of the Circuit Judges who are in regular active service not having voted in favor of it, (Federal Rules of Appellate Procedure and Local Rule 35) the Suggestion for Rehearing En Banc is also DENIED.

( ) A member of the Court in active service having requested a poll on the reconsideration of this cause en banc, and a majority of the judges in active service not having voted in favor of it, rehearing en banc is DENIED.

ENTERED FOR THE COURT:

J. S. WILLIAMS
United States Circuit Judge

CLERK'S NOTE:
SEE FRAP AND LOCAL
RULES 41 FOR STAY OF THE
MANDATE.

U.S. District Court
Northern District of Texas
FILED
June 10, 1982
Joseph McElroy, Jr., Clerk
By R. TEMPLE
Deputy

**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION**

UNITED STATES OF AMERICA

vs.

JAMES COCKRELL

CRIMINAL NO. CR-3-76-132

FINDINGS, CONCLUSIONS AND RECOMMENDATIONS OF THE UNITED STATES MAGISTRATE

Pursuant to the provisions of 28 U.S.C. 636(b), and an Order of the Court in implementation thereof, the subject cause has previously been referred to the United States Magistrate. The findings, conclusions and recommendation of the Magistrate are as follows:

FINDINGS AND CONCLUSIONS:

This is an application for relief pursuant to the provisions of 28 U.S.C. § 2255 brought by a former inmate of the F.C.I. at El Reno, Oklahoma, who is now on parole. Petitioner was convicted of conspiracy to defraud as well as 15 substantive offenses committed in furtherance of the conspiracy which consisted of wire fraud, mail fraud, and interstate transportation of checks taken by fraud. The Court of Appeals for this Circuit affirmed the conviction in a reported decision. See *United States v. Becker*, 569 F.2d 951 (5th Cir. 1978). The facts of the case are set out in detail in the Fifth

Circuit opinion and need not be repeated here. It is sufficient to note that this petitioner was the one who performed a demonstration of the so-called "Henderson Process" at a foundry in Dallas for the benefit of certain investors in the fraudulent scheme. Petitioner was unable to retain counsel and counsel was therefore appointed to represent him. Petitioner here seeks relief on the ground that he did not receive the effective assistance of counsel for the following reasons:

1. That counsel failed to conduct adequate consultation with him prior to and during the trial and upon the appeal of the conviction;

2. That counsel failed to adequately investigate the facts of the case, failed to adequately research the applicable law, and failed to prepare adequately for trial and for appeal;

3. That counsel failed to consult with or to call any of petitioner's potential character witnesses;

4. That counsel failed to call attention to petitioner's impressive military record; and

5. That counsel was guilty of conduct which embarrassed the petitioner which rendered his trial unfair.

Since the allegations concerning counsel's actions and omissions could not be resolved by a review of the trial record, an evidentiary hearing was held by the Magistrate at the direction of the Judge of this Court. A transcript of that evidentiary hearing appears as two volumes in this record. At the hearing, petitioner and the attorney whose effectiveness he was attacking testified, and the affidavits of 16 other witnesses were entered into the record by agreement of the parties.

Petitioner's fifth ground, in which he alleges that he was embarrassed by the actions of his attorney, is the most easily disposed of and will therefore be considered first. Petitioner complains that his lawyer placed him in an embarrassing position before the Court by failing to tell him that he had to be present for a bond reduction hearing and

that he consequently was not present and that the Judge was angry at counsel for not having him present. But the record further reflects that the motion to reduce the bond was granted, and petitioner has not shown that the failure of counsel to have him present had any effect upon the decision to reduce bond. Petitioner also complains of another instance in which counsel sent him down to the garage at the County Courthouse, some five or six blocks away from the Federal Courthouse, to retrieve some documents which counsel had left in her automobile, and which resulted in petitioner being forced to enter the courtroom after the jury had been seated and having to mount the witness stand while still red of face and out of breath from his run to and from the County Courthouse garage. Petitioner contends that he was the first witness scheduled to testify, but the record does not bear that out. The record reflects that petitioner took the stand for the first time immediately following a recess. The court reporter's note in the trial transcript, Volume IV, page 1396, reflects that the recess had been called by the Judge and all parties had been instructed to be back at 11:30 A.M., and that the trial actually resumed at 11:31 A.M. Immediately following the recess there was a statement by counsel for one of the other defendants and there was then a conference at the bench between the Court and petitioner's attorney as well as two other lawyers. This record does not indicate, as petitioner would have it, that everyone was seated in the courtroom and waiting for him to arrive and testify when he rushed in late. Nor is there anything in this record to support petitioner's claim that he suffered any prejudice even if the events he complains about actually occurred. Accordingly, he is not entitled to relief on his fifth ground.

In his fourth ground, petitioner complains that his attorney failed to call attention to his favorable military record. But the record reflects that petitioner testified about his military record without objection. (Trial transcript, Volume IV, page 1399.) Petitioner is not entitled to relief on his fourth ground.

In his first and second grounds, petitioner complains, on the one hand, that counsel did not consult with him in sufficient detail to prepare a defense, and on the other hand that counsel did not adequately investigate the facts of the case. I do not believe that the record in this case supports either of these contentions. The testimony of both petitioner and of counsel at the evidentiary hearing before the Magistrate indicates that they had many conferences over an extended period of time, and that counsel devoted a great deal of time to investigation and research of the case. Petitioner even referred to counsel as being "very diligent". (Transcript of evidentiary hearing, Vol. 1, page 150.) I therefore do not believe that the allegations that counsel failed to consult with petitioner or to actively work to prepare the case are justified. Petitioner is not entitled to relief on his first and second grounds.

This leaves for consideration petitioner's third ground, in which he complains that counsel failed to call certain witnesses. As the record reflects, and as the Court will recall, petitioner's contention throughout the trial was that he had merely demonstrated the so-called "Henderson Process" for a $100 fee, and that he had no knowledge of the fraudulent activities of David McCord and the other members of the conspiracy. Petitioner claims that he wanted counsel to call, among others, the witnesses Micky Cox and Harvey Stowers. According to counsel's testimony at the evidentiary hearing, her notes that she took at the time that she interviewed petitioner indicated that Micky Cox could testify that petitioner had advised him against investing in the "Henderson Process". (Transcript of evidentiary hearing, Vol. 2, page 28.) This, of course, was very material to petitioner's defense, because if he were able to show through Cox that he had advised a potential investor against investing because of the speculative nature of the process, such evidence would support his contention that he did not know that other persons were being swindled by McCord and his confederates. Counsel actually had Cox under subpoena, but he did not appear for the trial although he telephoned and left a message with the United States Attorney. There was

a discussion in the courtroom concerning this. (Trial transcript, Volume IV, pages 1453-1455.) As reflected by the record, the Court gave counsel time to contact the witness during the noon hour, but there is nothing in the record to indicate that counsel did, nor did she make any further attempts to procure the presence of Cox, by motion for continuance or otherwise. The testimony by the witness Stowers appears in his affidavit which was submitted by agreement of the parties at the evidentiary hearing. The important thing contained in the affidavit is the statement by Stowers that he had fabricated machinery and equipment for petitioner for use in the building near Red Oak, Texas and that petitioner had paid him for his parts and labor until such time as McCord's company, Tex-A-Chief, was unable to raise more money. This testimony would tend to corroborate petitioner's claim that the money which he received from McCord was not for his own use and benefit but was for the purpose of paying for services and equipment at the Tex-A-Chief building. McCord, of course, had testified that the checks which he issued to petitioner were for petitioner's services, and the Government argued that the checks which petitioner had received showed his participation in the conspiracy and scheme to commit fraud. (Trial transcript, Volume VI, page 1981.) The testimony of Stowers would have been material to petitioner's defense. Counsel merely testified at the evidentiary hearing that she had tried to reach Stowers by telephone but had been unable to do so. Stowers' affidavit reflected that he lives in the City of Dallas and that he has done business in the City of Dallas since at least 1972. The record does not reflect that counsel ever attempted to issue a subpoena for Stowers, although he could have been served without difficulty. Counsel indicated in her testimony that the reason she didn't call Stowers was because she did not think that his testimony would have been particularly beneficial to the case. (Transcript of evidentiary hearing, Vol. 2, pages 48-55.) There are numerous other witnesses who were available and who were not called, according to the testimony and to the series of affidavits submitted by agreement at the evidentiary hearing, but I

believe the two witnesses Cox and Stowers were the most crucial. It is apparent from the record that counsel put a great deal of effort into the preparation and trial of the case, but that she failed to appreciate the importance of the testimony of these two witnesses. Accordingly, I believe that petitioner has met the burden of proof in establishing an identifiable lapse on the part of counsel which had an actual, adverse impact upon the fairness of his trial resulting from such lapse, and that petitioner is thus entitled to habeas corpus relief. See *Boyd v. Estelle*, 661 F.2d 388 (5th Cir. 1981).

RECOMMENDATION:

I recommend that the application for relief be granted, subject to the Government's right to afford petitioner a new trial within a reasonable period of time.

SIGNED this 10th day of June, 1982.

John B. Tolle
UNITED STATES MAGISTRATE

U.S. District Court
Northern District of Texas
FILED
October 15, 1982
Joseph McElroy, Jr., Clerk
By HARRIS
Deputy

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

UNITED STATES OF AMERICA
V.
JAMES COCKRELL

CRIMINAL ACTION NO. CR-3-76-132
(CIVIL ACTION NO. CA-3-79-747-D)

ORDER

Came on for consideration before the Court the Government's Objections to the Findings, Conclusions and Recommendation of the United States Magistrate that Petitioner James Cockrell (Cockrell) be granted §2255 relief subject to the Government's opportunity to afford Cockrell a new trial within a reasonable period of time. The Court has reviewed the basis for the Magistrate's recommendation, along with the parties' arguments, and is of the opinion that the Magistrate's recommendation should not be adopted.

I. *Background*

A full recitation of the facts surrounding Cockrell's trial for conspiracy to defraud and for fifteen substantive offenses committed in furtherance of the conspiracy can be found in the Fifth Circuit's opinion affirming his conviction. *United States v. Becker*, 569 F.2d 951 (5th Cir. 1978). The Government's case against Cockrell and four other alleged co-conspirators portrayed a complex scheme to induce investments, in the form of silver options, refining contracts, loan advance fees, and outright loans, for the development of commercial processes designed to recover silver and other precious metals from lowgrade graphitic schist ore. Cockrell demonstrated a secret process (the Henderson process) for extracting exceptionally high amounts of silver from the ore in the

presence of a group of potential investors. Cockrell later reduced his findings to a written report. The Government theorized that the ore was of little value and that the co-conspirators knowingly misrepresented the potential yield from the ore in order to dupe unwitting investors. Cockrell's connection with the conspiracy was further bolstered by the Government's proof that he had worked as a consultant and processor for fellow conspirator David McCord at an extracting and refining plant near Waxahachie, Texas. From Cockrell's willingness to forego a set fee in exchange for access to the building and irregular payments and reimbursements amounting to approximately $8,000, the Government suggested that Cockrell had a financial stake in the success of the fraudulent scheme. Cockrell maintained at trial, and continues to maintain, that he had no knowledge of any fraud or conspiracy and that his part was limited to the demonstration of the Henderson Process to an unidentified audience for the sum of $100.

Because of Cockrell's inability to retain counsel, Edith James was appointed to represent him. Cockrell, who is now on parole, alleges that he was denied effective assistance of counsel. The Magistrate conducted a full evidentiary hearing and outlined the following asserted grounds as the basis for Cockrell's claim:

(1) counsel failed to conduct adequate consultation with Cockrell prior to and during the trial and upon the appeal of the conviction;

(2) counsel failed to adequately investigate the facts of the case, failed to adequately research the applicable law, and failed to prepare adequately for trial and for appeal;

(3) counsel failed to consult with or to call any of petitioner's potential fact and character witnesses;

(4) counsel failed to call attention to petitioner's impressive military record; and

(5) counsel was guilty of conduct which embarrassed the petitioner and rendered his trial unfair.

The Court is of the opinion that the Magistrate's findings and conclusions with regard to grounds 1, 2, 4, and 5, are amply supported by the testimony at trial and at the evidentiary hearing. There is absolutely no support for Cockrell's claims that James failed to consult with him or to actively prepare his defense prior to trial. The record indicates that James devoted approximately 190 hours to the preparation and trial of the case and Cockrell himself continues to acknowledge James' diligence. Evidentiary Hearing Transcript (EHT), Vol I, at 150. Cockrell's claim that his military record was not brought to light is simply not supported by the evidence. Trial Transcript (T.Tr.), Vol. IV, at 1399, and his claim that he was embarrassed by counsel's conduct is wholly unsubstantial.

The Magistrate did find, however, that James' failure to secure the testimony of certain witnesses rose to the level of an unconstitutional and prejudicial deprivation. While James actively participated in the cross examination of the numerous witnesses who testified at the trial on behalf of the Government and the other defendants, the only direct testimony offered in Cockrell's defense was from Cockrell himself. At the evidentiary hearing Cockrell submitted the affidavits of sixteen persons whose testimony he claims would have aided his defense. Those absences most critical, according to the Magistrate's findings, were the statements of Micky Cox and Harvey Stowers. Cockrell testified that Cox would have related the substance of a conversation in which he had advised Cox against investing the Henderson Process. Stower's affidavit indicates that he might have corroborated Cockrell's story that the money received from McCord was used to purchase equipment and to compensate employees at the Waxahachie plant.

II. *Ineffective Assistance of Counsel*

The Fifth Circuit recently summarized the general standards for reviewing claims of ineffective assistance of counsel in *Washington v. Strickland*, 673 F.2d 879 (5th Cir. 1982):

> In this circuit, the standard for constitutionally effective assistance of counsel is "not errorless counsel, and not counsel judged ineffective by hindsight, but counsel reasonably likely to render *and rendering* reasonable effective assistance." *Herring v. Estelle*, 491 F.2d 125, 127 (5th Cir. 1974) (quoting *MacKenna v. Ellis*, 280 F.2d 592, 599 (5th Cir. 1960), *adhered to in pertinent part on rehearing en banc*, 289 F.2d 928 (5th Cir.), *cert. denied*, 368 U.S. 877, 82 S. Ct. 121, 7 L. Ed.2d 78 (1961) (emphasis by *MacKenna* panel). "[T]he methodology for applying this standard involves an inquiry into the actual performance of counsel conducting the defense and a determination of whether reasonably effective assistance was rendered based on the *totality* of circumstances in the entire record." *Washington v. Estelle*, 648 F.2d 276, 279 (5th Cir. 1981) (emphasis in original).

Id. at 891, *quoting*, *Washington v. Watkins*, 655 F.2d 1346, 1355 (5th Cir. 1981). Each case involving the constitutional issue of effectiveness of counsel depends on the specific conduct to the parties involved. *King v. Beto*, 429 F.2d 221, 222 n.1 (5th Cir. 1970) (per curiam). This Court must take into account all of the circumstances of the case, but only as those circumstances were known to James at the time in question. *Washington v. Watkins, supra*, 655 F.2d at 1356. The factors to be considered in reviewing counsel's preparation for and participation at the trial include the number, nature, and seriousness of the charges, the strength of the Government's case, and the strength and complexity of the defendant's possible defenses. *Gary v. Lucas*, 677 F.2d 1086 (5th Cir. 1982).

In order to avoid the temptation to evaluate counsel's effectiveness with the benefit of hindsight, the Fifth Circuit has determined that an independent inquiry into the quality of counsel's representation should precede any discussion of demonstrated prejudicial impact. *Washington v. Strickland, supra*, 673 F.2d at 895. Counsel's ability to *foresee* prejudicial consequences, however, may be considered when

examining alternatives reasonably available to counsel at the time of the challenged act or omission. Thus, counsel's awareness that alternatives existed which would have probably diminished the likelihood or severity of prejudice plays a part in determining whether counsel satisfied the qualitative, normative standards dictated by the Sixth and Fourteenth amendments to the Constitution. *Washington v. Watkins, supra,* 655 F.2d at 1354.

If the Court concludes that counsel's representation fell short of the constitutional standard, the inquiry shifts from counsel's subjective and contemporaneous perspective to the actual prejudicial consequences allegedly attributable to counsel's failings. The petitioner bears the burden of demonstrating that "but for his counsel's ineffectiveness his trial, but not necessarily its outcome, would have been altered in a way helpful to him." *Washington v. Strickland, supra,* 673 F.2d at 902. While the exact degree of impact required has not yet been determined, it is clear that the change must be something more than insubstantial or de minimus. *Id.; Washington v. Watkins, supra,* 655 F.2d at 1362 n.43. If the petitioner is successful in carrying this burden, the Government must then prove beyond a reasonable doubt that counsel's ineffectiveness was harmless error under the *Chapman v. California,* 386 U.S. 18 (1967), analysis. *Washington v. Strickland, supra,* 673 F.2d at 902.

A. *Cox's Testimony*

Applying the above standards to James' failure to secure Micky Cox's testimony at trial, the Court finds that this omission does not constitute ineffective assistance of counsel. Cox was served with a subpoena on November 11, 1976, four days before he was to appear to testify. When Cox informed Cockrell prior to trial that he had received the subpoena he offered no indication that he would not appear. EHT, Vol. II, at 201. On the day of trial Cox failed to appear but left a message with the U.S. Attorney's office for James to call him. James later attempted without success to reach Cox. T. Tr., Vol. IV, at 1453-54. Cockrell

concedes that James tried to locate Cox that afternoon. EHT, Vol. I, p. 113. Both the trial and evidentiary hearing transcripts indicate that Cockrell assured the Court and James at the time that Cox's testimony was not necessary. T.TR., Vol. IV, at 1550; EHT, Vol. II, at 138, 171. Cockrell now suggests that James should have moved for a continuance. It is highly unlikely, however, that this Court would have granted such a motion, given the nature of the trial and the number of defendants. While a writ of attachment might have been considered, James inability to determine Cox's whereabouts at the time would have counseled against such a request. Thus, neither action was foreseeably likely to lessen any potential prejudicial impact caused by Cox's absence. In short, James cannot be faulted for the default of an errant witness.

Finally, even if the Court found constitutional error in James' inability to produce Cox, Cockrell has failed to satisfy the requirement of a showing of prejudice. Claims relating to absent witnesses are not favored due to the tactical considerations inherent in the choice of witnesses and due to the largely speculative nature of the inquiry into what the witnesses' testimony might have been. *Boyd v. Estelle*, 661 F.2d 388, 390 (5th Cir. 1981); *Washington v. Watkins, supra*, 655 F.2d at 1363-64. *United States v. Guerra*, 628 F.2d 410, 413 (5th Cir. 1980), *cert. denied*, 450 U.S. 934 (1981); *Buckelew v. United States*, 575 F.2d 515, 521 (1978). Cockrell has not produced an affidavit from Cox relating the content of his missing testimony. Cockrell's own speculations as to what Cox might have been able to contribute through his testimony are insufficient to establish a prima facie case of how the trial might have been altered in a beneficial and not insubstantial manner if Cox had been present to testify.

B. *Stowers' Testimony*

On September 30, 1976, James submitted a request to have Stowers subpoenaed at the Government's expense. The request for Stowers was subsequently withdrawn so that

other witnesses could be substituted.[1] James testified that Cockrell did not supply her with the whereabouts of Stowers and that her own attempts to locate him were futile. EHT, Vol. 1. II, 48, 54, 115-19. More importantly, James indicated that Cockrell's references to the substance of Stowers' testimony did not convince her that his presence would be valuable. Stowers was employed by Cockrell to fabricate a furnace for the removal of silver from x-ray film at the Waxahachie Plant. James recollected that Stowers' main connection involved the temporary loss of some of his own equipment when the Waxahachie plant was shut down by the landlord after McCord fell into arrears on his rental payments. EHT, Vol. II, at 47-78. According to James, she perceived at the time that Stowers' testimony would have been tangential to Cockrell's defense and cumulative of other anticipate testimony on the evil doings of McCord. In light of these facts, counsel's failure to launch a more aggressive campaign to seek out Stowers' presence at trial does not equal ineffective assistance of counsel.

Even if James was unreasonably mistaken in her estimation of the supposed scope of Stowers' testimony, and even if such miscalculation raised constitutional implications, the Court would still not be convinced of any prejudicial impact. Stowers affidavit, which was submitted during the evidentiary hearing, empasizes Stowers' own lack of involvement rather than Cockrell's innocence. Stowers' apparent ability to relate his knowledge that Cockrell received his funds to purchase equipment and hire employees from McCord would have corroborated Cockrell's story. McCord, however, offered the same testimony at trial, and the Government's minimal efforts to controvert either person's testimony, suggests that their theory did not depend on the total absence of any legitimate business

[1]In total James received permission to issue three subpoenas. Neither Cox, nor Merwin White, appeared at trial. The third subpoena was apparently returned unserved, but James was able to obtain testimony similar to what she expected to obtain from this third witness by cross examining a witness who was from the same company. EHT, Vol. II, at 55.

purpose associated with the Waxahachie plant. Further, the possible benefit of Stowers' testimony would have been undermined by his own statement that when cash flow faltered he and Cockrell renegotiated his compensation plan with the assurance that Stowers would share a portion of Cockrell's eventual gain from the project. This supports, rather than weakens, the Government's sought after inference that Cockrell expected to realize a share in the fruits of the fraud and that he was willing to make initial sacrifices disproportionate to any profit sharing arrangement for the legitimate sales of silver. Cockrell himself testified that he was not aware that McCord actually sold any of the silver produced at the Waxahachie plant. T. Tr. Vol. IV, at 1472. The inference, which the jury apparently accepted, was that Cockrell was willing to forego immediate and ordinary compensation in order to secure a share of greater goods.

C. *Overall Impact*

While the absence of Cox and Stowers at the trial does not betray a serious inadequacy of representation, the Court is compelled to examine the possibility that counsel's general failure to seek out and interview potential witnesses was a critical error. As the Fifth Circuit has noted, "Since 'investigation and preparation are the keys to effective representation,' ABA Projects on Standards for Criminal Justice, Standards Relating to the Prosecution Function and the Defense Function 224 (App. Draft 1971), court-appointed counsel have a duty to interview potential witnesses and 'make an independent examination of the facts circumstances, pleadings and laws involved.'" *Rummel v. Estelle*, 590 F.2d 103, 104 (5th Cir.), *cert. granted*, 441 U.S. 960 (1979), *quoting Moltke v. Gillies*, 332 U.S. 708, 721 (1948).

The record indicates that other than isolated phone calls and letters, James conducted only one in depth interview of a potential witness. Again, however, returning to the totality of the circumstances as they were known to James, the Court does not find fault of a constitutional dimension. James testified that it was impossible for her to locate most

of the persons mentioned by Cockrell in connection with his defense because the information on their whereabouts, when provided, was inconsistent and unhelpful. EHT, Vol. II, at 33, 34, 54, 67. As the Court noted in *Lovett v. State of Florida*, 627 F.2d 706, 708 (5th Cir. 1980), counsel is "not required to pursue every path until it bears fruit or until all conceivable hope withers." Here, as in *Lovett*, counsel might have done more to find witnesses, but her efforts nonetheless constitute reasonably effective assistance of counsel. *See also United States v. Hughes*, 635 F.2d 449, 453 (5th Cir. 1981).

Cockrell's current counsel recited a litany of names at the evidentiary hearing and asked James whether the names had come up during her client consultations. In order to avoid any misleading impact of this line of questioning, it is important to note a distinction recognized by the Fifth Circuit in *Gray v. Lucas*, 677 F.2d 1086 (5th Cir. 1982). The court noted that while a lawyer's failure to investigate a witness who has been identified as crucial may indicate an inadequate investigation, the failure to investigate everyone whose name happens to be mentioned by the defendant does not suggest ineffective assistance. 677 F.2d at 1093 n.5. [2]/Further, while James may have failed to fully appreciate

[2]While the Court's defermination that James' overall investigation of witnesses does not constitute ineffective assistance of counsel eliminates the necessity for examining prejudicial impact, a few comments on the sixteen affidavits submitted by Cockrell are in order. At least three of the affiants, Dr. Morris Key, David McCord, and Cockrell himself, testified at trial. Another affiant Edward Walther had been fully interviewed by James and purposefully eliminated for tactical reasons. *See* Gray v. Lucas, 677 F.2d 1086, 1093 (5th Cir. 1982) (counsel's decision not to call witness for tactical reason should be respected). Further, Merwin White, who has now offered an affidavit, fails to explain why he did not appear at the trial in answer to the subpoena he had received. Of the remaining witnesses all but one of the character witnesses were out of state at the time of the trial and the greater majority indicated that they had not been in close contact with Cockrell for ten to twenty years. Given the more controlled setting in which Cockrell's current counsel could conduct his investigation and the presentation of this testimony in simple, affidavit form, the Court is not so impressed with the content of these statements that it cannot be sympathetic to the task confronting James.

the usefulness of character witnesses on Cockrell's behalf, she did testify that she wanted to have a character witness waiting in the wings and that she would have called such a witness to the stand if the woman whom Cockrell assured her he was bringing had not failed to appear at trial. EHT, Vol. II, at 77. Ordinarily, counsel may not depend on the defendant's efforts alone to obtain testimony, *Bell v. Georgia*, 554 F.2d 1361 (5th Cir. 1977), but given a limitations on the number of witnesses James was permitted to subpoena and her justified belief that compulsory process would be less necessary for character witnesses, the Court does not find the omission indicative of inadequate assistance.

Those cases in which the failure to investigate and present witnesses has been determinative typically involve one of two factors. First, in cases where counsel fail to secure the testimony of known factual witnesses who are critical to defendant's sole defense and readily available, constitutional error is likely. *See Gomez v. Beto*, 462 F.2d 596 (5th Cir. 1972) (failure to call any of three available witnesses who could have corroborated alibi defense). Secondly, constitutional error may be suggested when counsel's lapses in investigation of witnesses are syptomatic of pervasive incompetence, ineffectiveness, or indifference. *See Kemp v. Leggett*, 635 F.2d 453 (5th Cir. 1981) (murder cases where counsel interviewed no eyewitnesses, conducted no investigation, failed to call any of seven character witnesses present in courtroom, and admitted his own incompetence).

In cases such as this, counsel's overall inquiry into the facts of the case and her use of cross examination to elicit favorable testimony militate against a finding of ineffective assistance of counsel. James' may not have provided errorless representation, but in light of her thorough dedication to researching the law, examining S.E.C. documents, sorting through the prosecution's files, cross examining witnesses, and eliciting Cockrell's story from him on the witness stand, the Court is convinced that she was capable of rendering and rendered reasonably effective assistance of counsel.

Accordingly, the Court concludes that the Magistrate's recommendation should not be adopted and that all relief requested pursuant to § 2255 should be denied.

It is so ORDERED.

Dated this 14 day of October, 1982.

R. M. Hill
United States District Judge

APPENDIX E

Rule 404. Character Evidence Not Admissible to Prove Conduct; Exception; Other Crimes.

(a) Character evidence generally.

Evidence of a person's character or a trait of his character is not admissible for the purpose of proving that he acted in conformity therewith on a particular occasion, except:

(1) **Character of accused.** Evidence of a pertinent trait of his character offered by the accused, or by the prosecution to rebut the same;

* * * *

(3) **Character of witness.** Evidence of the character of a witness, as provided in Rules 607, 608, and 609.

Rule 608. Evidence of Character and Conduct of Witness.

(a) Opinion and Reputation Evidence of Character

The creditibility of a witness may be attacked or supported by evidence in the form of opinion or reputation, but subject to these limitations: (1) the evidence may refer only to character for truthfulness or untruthfulness, and (2) evidence of truthful character is admissible only after the character of the witness for truthfulness has been attacked by opinion or reputation evidence or otherwise.

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No. 83-1503

In the Supreme Court of the United States

OCTOBER TERM, 1983

JAMES COCKRELL, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether petitioner was denied his right to effective assistance of counsel at trial.

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BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. A1-A12) is reported at 720 F.2d 1423.

JURISDICTION

The judgment of the court of appeals was entered on December 16, 1983. A petition for rehearing was denied on January 19, 1984 (Pet. App. B1). The petition for a writ of certiorari was filed on March 12, 1984. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Northern District of Texas, petitioner was convicted on one count of conspiracy, in violation of 18 U.S.C. 371, and on fifteen counts of mail fraud, wire fraud and interstate travel in aid of fraud, in violation of 18 U.S.C. 1341, 1343 and 2314. He was sentenced to a 15-year term of imprisonment. The conviction was affirmed on direct appeal. *United States* v. *Becker*, 569 F.2d 951 (5th Cir.), cert. denied, 439 U.S. 865 (1978). Following his conviction and appeal, petitioner filed a motion under 28 U.S.C. 2255 to vacate his sentence, asserting that he had been denied effective assistance of counsel. The district court denied relief (Pet. App. D1-D11), and the court of appeals affirmed (Pet. App. A1-A12). Petitioner now has been released on parole (Pet. 3).

1. The evidence at trial showed that petitioner and his co-conspirators engaged in a complex scheme to induce investments in the mining of silver and other precious metals from low grade ore. Petitioner's involvement in the scheme centered on the demonstration of the "secret Henderson process," which reputedly extracted exceptionally high amounts of silver at low costs. Petitioner's demonstration and report claimed a recovery yield five times greater than he had ever achieved. The government contended at trial that the ore and the extraction process actually were of little value and that the demonstration was conducted in order to dupe potential investors. Petitioner's involvement in the fraud was corroborated by his financial arrangement with co-conspirator David McCord. Petitioner worked for McCord and was willing to forgo regular payments in exchange for access to the refining plant and ir-

regular payments totalling approximately $8,000—circumstances that tended to show that petitioner had a financial stake in the success of the fraudulent scheme. Petitioner maintained that he had no knowledge of the fraud and that he had simply been paid $100 to demonstrate the Henderson process. Pet. App. A4.

Petitioner's Section 2255 motion asserted five grounds on which his trial counsel was ineffective, only three of which he continues to press in his petition for a writ of certiorari (Pet. 13 n.5).[1] The first allegation was that counsel failed to consult adequately with petitioner prior to and during trial and in connection with the appeal. The court of appeals rejected this claim on the basis of the magistrate's and district court's findings that counsel had devoted approximately 190 hours to pretrial preparation and 17 hours to consultation with petitioner and that petitioner had acknowledged that counsel was diligent. Pet. App. A6-A7, C4, D3. The second allegation was that counsel had failed adequately to investigate, research and prepare the defense case for trial. The court of appeals also rejected this claim, noting that counsel had accumulated a thick file of legal research, filed numerous pretrial motions, and successfully moved to have petitioner released on his own recognizance. Pet. App. A7.

The two opinions below and the magistrate's findings are addressed primarily to petitioner's third claim: that counsel failed to contact and call certain potential fact and character witnesses. The two prin-

[1] Petitioner apparently has abandoned his claims, rejected by the courts below (Pet. App. A7, C2-C3, D3), that counsel failed to call adequate attention to his impressive military career and that counsel embarrassed petitioner before the court.

cipal fact witnesses were Micky Cox and Harvey Stowers.[2] According to defense counsel's notes, Cox would have testified that petitioner had advised Cox against investing in the Henderson process because of its speculative nature. Counsel had subpoenaed Cox, but he did not appear at trial and petitioner himself waived Cox's presence in open court, stating that his testimony would not be necessary. Pet. App. A8-A9, C4-C5, D4-D5. Stowers, according to his affidavit, would have testified that he did work for petitioner and was paid for labor and materials. This testimony, it was claimed, would have supported petitioner's contention that the monies he received from McCord were used to cover legitimate business expenses rather than as payment for petitioner's participation in the scheme to defraud. Counsel testified, however, that petitioner failed to supply her with information regarding Stowers' whereabouts and that her efforts to locate him were futile. She requested that a subpoena be issued to compel Stowers' presence but later withdrew that request because she decided to use the limited number of government-funded subpoenas to obtain the presence of witnesses whose testimony she regarded as more important. Pet. App. A9-A11, C5-C6, D6-D8.

The court of appeals rejected petitioner's claim of ineffective assistance with respect to the failure of Cox and Stowers to testify (Pet. App. A8-A11). It agreed with the district court's conclusion that counsel took reasonable steps to secure the presence of Cox and that counsel "cannot be faulted for the default of an errant witness" (*id.* at A8 (quoting Pet. App.

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[2] The magistrate recommended that petitioner be granted habeas corpus relief on the basis of counsel's failure to call these two witnesses (Pet. App. C4-C6).

D6)). The court of appeals also found that petitioner had failed to make a showing that prejudice resulted from Cox's absence. Petitioner had not produced either Cox or Cox's affidavit of what his testimony would have been, and the court found petitioner's own speculations on the point insufficient to establish a prima facie showing of prejudice. In this regard, the court stressed that petitioner's contention that he was prejudiced by the absence of Cox's testimony rested on "intrinsically shaky ground," since the jury might well have wondered why, if petitioner attempted to dissuade Cox from investing in the Henderson process, he did not give the same advice to other potential investors. Pet. App. A9.

With respect to Stowers' failure to testify, the court of appeals noted that counsel had testified in the instant Section 2255 proceedings that petitioner did not supply her with information on Stowers' whereabouts and that her own attempts to locate Stowers proved futile. Moreover, counsel had decided that Stowers' testimony would have been cumulative to the testimony she planned to elicit from McCord and petitioner to explain the purpose of the checks McCord issued to petitioner, and the court of appeals held that the district court's holding that this was an informed tactical choice was not clearly erroneous. The court of appeals further concluded that even if counsel were unreasonably mistaken in her estimation of the supposed scope of Stowers' testimony, petitioner had failed to show any substantial prejudice as a result. The court noted in this regard that McCord and petitioner had "laboriously explained the source and purpose of each check [petitioner] received" (Pet. App. A10), thereby indicating that Stowers' testimony would have been cumulative, and that the force of Stowers' testimony would have been under-

mined by his statement that when the cash flow faltered, he and petitioner renegotiated his compensation plan with the assurance that Stowers would share a portion of the eventual gain from the project. In the court of appeals' view, this testimony would have supported rather than weakened the inference the government urged: that petitioner expected to realize a share in the fruits of the fraud and was willing to make initial sacrifices disproportionate to any profit-sharing arrangement for legitimate sales of silver. Pet. App. A9-A11.

ARGUMENT

Petitioner contends (Pet. 9-23) that the court of appeals erred in declining to set aside his conviction on the ground of ineffective assistance of counsel. This contention is without merit. Petitioner's trial counsel was an experienced criminal defense attorney who had handled more than 200 criminal cases prior to representing petitioner, and she devoted many hours to researching the law and other matters relating to the case, consulted extensively with petitioner, and developed a defense strategy. Pet. App. A11. Petitioner maintains, however, that counsel nevertheless was ineffective because she failed to call certain witnesses—particularly Cox and Stowers—to testify. However, this Court's recent decision in *Strickland* v. *Washington*, No. 82-1554 (May 14, 1984), makes clear that the court of appeals correctly rejected this argument. Counsel's conduct plainly did not deprive petitioner of a fair trial by "so undermin[ing] the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result." *Strickland* v. *Washington*, slip op. 16. Further review of this fact-bound claim therefore is not warranted.

Petitioner has failed to satisfy either prong of the two-part test announced in *Strickland* for establishing ineffective assistance of counsel: (1) that counsel made errors so serious that she was not functioning as the "counsel" guaranteed by the Sixth Amendment, and (2) that counsel's deficient performance in turn deprived the defendant of a fair trial and a reliable result (slip op. 17).

1. With respect to the first prong of the two-part inquiry required by *Strickland*, petitioner has wholly failed to overcome the "strong presumption" that counsel's conduct fell within the wide range of reasonable professional assistance and that counsel made all significant decisions in the exercise of reasonable professional judgment (slip op. 19-20). See also *United States* v. *Cronic*, No. 82-660 (May 14, 1984), slip op. 10 & n.23. The courts below both concluded that counsel could not be faulted for the failure of Cox, the errant witness, to appear at trial (Pet. App. A8, D6), and this conclusion was clearly correct. Cox was served with a subpoena four days prior to trial, and although he thereafter talked to petitioner, he never gave any indication that he would not appear. Counsel then attempted to locate Cox when he did not appear as scheduled. Although counsel conceivably might have sought a continuance to secure Cox's attendance, the courts below found it unlikely that such a motion would have been granted since Cox could not be located, and petitioner in any event then waived Cox's presence in open court, informing counsel and the court that Cox's testimony would not be necessary. Pet. App. A8, D6. This Court has made clear that the reasonableness of counsel's actions is reinforced where, as here, they are the product of such informed strategic choices made by the defendant or information supplied by him. *Strickland* v. *Washington*, slip op. 20-21.

There likewise is no basis for concluding that counsel's actions with respect to Stowers were outside the broad range of acceptable professional competence. As an initial matter, counsel testified at the Section 2255 hearing that petitioner failed to furnish her with information on Stowers' whereabouts and that her own attempts to locate him were unsuccessful. Cf. *Strickland* v. *Washington*, slip op. 20-21. Moreover, although counsel originally requested that Stowers be subpoenaed to appear, she subsequently withdrew that request in order to use her limited number of government-funded subpoenas for witnesses whom she regarded as more important. This was because counsel had decided that Stowers' testimony would simply have been cumulative to testimony that McCord and petitioner himself would give. The court of appeals affirmed the district court's finding that counsel had made an "informed tactical choice" in this regard (Pet. App. A10), and this Court stressed in *Strickland* that such "strategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable" (slip op. 20). Petitioner has made no colorable showing that counsel's decision here with regard to what the district court termed Stowers' "tangential" testimony (Pet. App. D7) falls within any exception to that general rule.[3]

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[3] Petitioner also faults (Pet. 18-21) counsel for not calling certain other witnesses, principally character witnesses, noting that 16 affidavits were presented in district court on this point. The district court observed, however, that counsel testified that it was impossible for her to locate most of those witnesses because when petitioner actually furnished information regarding their whereabouts, it was inconsistent or unhelpful. Moreover, of the 16 witnesses who submitted affidavits, three (Dr. Key, McCord and petitioner) did testify at

2. Even if petitioner were correct that counsel's actions with respect to Cox and Stowers fell outside the range of professional competence, the court of appeals nevertheless correctly denied relief because petitioner has not shown that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland*, slip op. 24.[4] Indeed, the court of appeals concluded that the testimony of Cox and Stowers might actually have harmed petitioner's case. The court reasoned that Cox's testimony (assuming that petitioner's speculation about what it would have been was credited) might have caused the jury to wonder why petitioner had not sought to dissuade others from investing in the fraudulent scheme as he allegedly tried to dissuade Cox. And the court rea-

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trial; counsel purposely eliminated a fourth for tactical reasons; and a fifth, Merwin White, in fact was subpoenaed but failed to appear. Of the remainder, all but one of the character witnesses were out of state at the time of trial, and a great majority indicated that they had not been in close contact with petitioner for 10 to 20 years. Moreover, counsel knew that petitioner himself had made arrangements for one character witness to be available on a standby basis, but that witness also did not appear. The district court therefore correctly rejected a claim of ineffectiveness based on these additional witnesses. Pet. App. D9-D10 & n.2.

[4] Petitioner argues (Pet. 9-12) that the court of appeals erroneously focused on "physical indicia" of counsel's diligence—*e.g.*, the 190 hours she devoted to the case, her filing of numerous pretrial motions, and her development of an extensive case file—rather than counsel's actual effectiveness. This argument is misplaced. The court of appeals discussed these factors only in addressing petitioner's generalized assertion that counsel did not adequately prepare for trial or consult with him (Pet. App. A6-A7). The court of appeals separately addressed petitioner's contentions regarding counsel's failure to call certain witnesses (*id.* at A8-A11).

soned that Stowers' testimony regarding his receipt of payments from petitioner would have been cumulative to McCord's and petitioner's own explanation of the source and purpose of each check petitioner received and, in addition, that certain portions of Stowers' testimony would have supported rather than weakened the government's theory that petitioner expected to realize a share in the fruits of the fraud. Pet. App. A9, A10-A11; see pages 5-6, *supra*. There thus is no basis here for believing that Cox's and Stowers' testimony would have created a reasonable doubt about petitioner's guilt or, accordingly, that counsel's conduct should undermine our confidence that a "just result" was reached. *Strickland*, slip op. 16-17, 24-25, 30.[6]

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[6] Petitioner's contention (Pet. 21-23) that the court of appeals erroneously used an "outcome determinative" test in rejecting his claim of prejudice is without merit. The court of appeals stated that there must be "some actual, adverse impact upon the fairness of his trial resulting from [counsel's] lapse" (Pet. App. A6, quoting *Boyd* v. *Estelle*, 661 F.2d 388, 389-390 (5th Cir. 1981))—a formulation that is consistent with the focus of this Court in *Strickland* on the fairness of the proceedings (slip op. 16-17). Although the court of appeals did observe that petitioner had failed to show that Cox's testimony "would have substantially altered the outcome of the trial" (Pet. App. A9), we understand that observation, in context, to mean only that Cox's testimony would have had an insubstantial impact on the jury's deliberations, especially since the court stressed that petitioner's argument about Cox's testimony was "intrinsically shaky" (*ibid.*). Moreover, the panel of the Fifth Circuit in this case explicitly stated that it was following the prior en banc decision of the Fifth Circuit (now the Eleventh Circuit) in *Washington* v. *Strickland*, 693 F.2d 1243 (1982), rev'd, No. 82-1554 (May 14, 1984). See Pet. App. A6. There the Fifth Circuit rejected an outcome determinative test and required a lesser showing of prejudice to the presentation of the defense. 693 F.2d at 1258.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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MAY 1984

Against this background, the court below cannot be assumed to have reviewed the prejudice element under a standard that was even *less* favorable to the defendant than that articulated by this Court in reversing the Fifth Circuit's decision in *Strickland*.

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